Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

FRANK F. FASI,
Petitioner,
v.
GANNETT COMPANY, INC.; LIBERTY NEWSPAPERS, LTD.; PHILLIPS MEDIA SERVICES; RUPERT PHILLIPS, an individual,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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40 PP

QUESTION PRESENTED

Whether a newspaper's accusations of criminal activity, dishonesty, and allegations that one is an "Extortionist" and has committed "Blackmail," even given in the guise of "opinion," are constitutionally protected by the First Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Frank F. Fasi, Mayor of the City and County of Honolulu, Hawaii, during the period at issue, respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

A copy of the Opinion and Judgment of the State District Court dated December 11, 1995, is reproduced at Appendix "A." A copy of the Opinion of the United States Court of Appeals, dated May 27, 1997, is reproduced at Appendix "B." Neither Judgments were published in either the official or the unofficial reports of the District Court for the Ninth Circuit.

JURISDICTION

The Court of Appeals entered its Judgment on May 27, 1997, affirming the Judgment of the District Court. This Petition for a Writ of Certiorari is filed within 90 days of that Order as required by 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Mayor of the City and County of Honolulu, State of Hawaii, during all relevant times, sued Gannett Company, Inc., Liberty Newspapers, Ltd., Phillips Media Services, Rupert Phillips, and the Honolulu Star-Bulletin ("Bulletin"), a daily newspaper published in Honolulu, Hawaii. The suit arises from accusations made by Respondents under the headline "Blackmail incorporated," that Petitioner is a "Blackmailer" and an "Extortionist." The statements were made on the "Opinion" page of the Bulletin on July 19, 1993. The statements, which were not reports of any news event, accused Petitioner of illegal and criminal activities, impugned his character and, among other things, branded Petitioner as an "Extortionist" and "Blackmailer." By inference, the headline also accused Petitioner of being a member of "Blackmail incorporated." A copy of the paper's accusations is reproduced at Appendix "C." The Complaint was filed July 18, 1995.

The Respondents filed a Motion to Dismiss which was granted by the District Court on December 4, 1995. The District Court concluded that the language is protected under the First Amendment and is not actionable.

The U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's Order.

Petitioner contends that these decisions are in direct conflict with a long line of First Amendment decisions of this Court and requests that a Writ of Certiorari issue to permit this Court to determine if false accusations of criminal conduct, specifically Blackmail and Extortion, are protected by the First Amendment if couched as "opinion."

A. Procedural Background.

On July 18, 1995, Petitioner filed the Complaint against the Honolulu Star-Bulletin, and its nominal and actual owners, publishers and editors. The claims allege libel per se, invasion of privacy/false light, and intentional infliction of emotional distress.

On August 28, 1995, Respondents filed a Motion to Dismiss Petitioner's Complaint pursuant to Rules 12(b)(6)(a) and 41(b).

Gannett Company, Inc. (erroneously named as Gannett Publishing, Inc.) and Hawaii Newspaper Agency also filed a Motion to Dismiss pursuant to 28 U.S.C.A. § 21332 and Rules 8 and 12. The matter was set for hearing on November 6, 1995.

On the Court's own Motion, the hearing on the matter was subsequently continued to December 4, 1995, and heard on that date.

Taking the matter under submission, the District Court granted Respondents' Motion to Dismiss the First Amended Complaint on December 11, 1995. On December 29, 1995, Judgment granting Respondents' Motion to Dismiss was filed by the Court.

On January 8, 1996, Petitioner filed his Notice of Appeal with the United States Court of Appeals, Ninth Circuit. On May 6, 1997, Petitioner's Appeal was heard, and the matter was taken under submission. On May 27, 1997, the United

States Court of Appeals, Ninth Circuit, affirmed the District Court ruling in an unpublished Opinion.

B. Factual Background

On July 19, 1993, Respondents published accusations in its newspaper, having the largest circulation in the State of Hawaii, labeling Petitioner as an "Extortionist" and a "Blackmailer."

The statements were headlined "Blackmail incorporated." The opening sentence states, in part, "Frank 'The Extortionist' Fasi is at it again" and concludes by stating, "When Frank Fasi extorts money from developers, it's the house-hunting public that is taken to the cleaners." The article also makes various other allegations and uses the word "donation" in quotations implying that certain "donations" were part of the alleged "Blackmail" and "Extortion" schemes.

REASONS FOR GRANTING THE PETITION

A. The Court Of Appeals' Interpretation Of First Amendment Protection Is In Direct Conflict With The Supreme Court's Interpretation And Is Therefore Erroneous

> Good name in man and woman, dear my Lord,
> Is the immediate jewel of their souls;
> Who steals my purse steals trash;
> 'tis something, nothing,
> 'Twas mine,'tis his, and has been slave
> to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> and makes me poor indeed.[1]

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[1] *Othello*, Act III, Scene iii, Lines 158-164, in complete works of William Shakespeare: The Cambridge Text 955, 971 (1980).

Supreme Court Justice Potter Stewart said it well when he stated that an individual's right to protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty. The protection of private personality, like protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."[2] Justice Stewart's words were quoted with approval in the Court's landmark decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) and most recently in the Court's interpretation of *Gertz* in *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S.Ct. 2939 (1985).

This Court has long held that, although many expressions of opinion are constitutionally protected, accusations of criminal or illegal activity, even in the form of opinion, are not. *Buckley v. Littell*, (2d Cir. 1976), 539 F.2d 882, *cert. denied*, 429 U.S. 1062; *Cianci v. New York Times Publishing Co.*, 639 F.2d 54. "[A]s a matter of constitutional law . . . the charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purpose of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co. v. Sullivan.*" *Cianci, supra*, at 59 [citing *Monitor Patriout v. Roy*, 401 U.S. 265, 91 S.Ct. 621 (1971)].

> Accusations of criminal activity, even in the form of opinion, are not constitutionally protected . . . While inquiry into motivation is within the scope of absolute privilege, outright charges of illegal conduct, if false,

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[2] *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966). (Stewart, J., concurring).

> are protected solely by the actual malice test. As noted by the Supreme Court of California, there is a critical distinction between opinions which attribute improper motives to a public officer and accusations in whatever form, that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior.

Cianci, supra, at 63 [citing *Rinaldi v. Hold, Reinhart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *cert. denied*, 434 U. 969, 98 S.Ct. 514 (1977)].

When "opinion" is something more than generally derogatory remarks but is laden with factual content, such as charging the commission of serious crimes, as is the case of the subject statements by Respondents, the First Amendment confers no absolute immunity, as distinguished from the qualified protection in the case of public figures accorded by *New York Times v. Sullivan*, 376 U.S. 254 (1964) *Id.* at 63.

Significantly, the decisions of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695 (1990) and *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), make it abundantly clear that there is no wholesale exemption from liability in defamation for statements of "opinion." That rule should be most stringently applied where, as here, Respondents are not reporting on an incident, but are making accusations of criminal activity after having time to reflect and carefully choose the newspaper's own words. The court in *Moldea v. New York Times Co.*, 22 F.3d 310 (V.C. Cir. 1994) stated that the Supreme Court rejected the argument that an accusation of perjury was non-actionable merely because it was offered as the writer's "opinion." Even though the statement in *Milkovich* appeared in an "opinion" column in the newspaper's sports section, the court found no relevance in this fact in reaching its decision,

because "an accusation of a crime is not the sort of discourse that even arguably is the usual province of such columns." *Moldea v. New York Times Co., supra*, at 313.

The court in *Moldea v. New York Times Co., supra*, at 313 also stated that statements of opinion can be actionable if they imply a false fact, or rely upon stated facts that are probably false. While in *Moldea* the offending statements were considered non-actionable, the statements made by Respondents herein are distinguishable from the statements at issue in the *Moldea* case. The offending statements in *Moldea* were in the form of a book review, while in the instant matter, the statements directly assault Petitioner's character and reputation and accuse him of being a "Blackmailer," "Extortionist" and part of "Blackmail incorporated."

In *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), decided prior to the holding in *Milkovich*, plaintiff, a real estate developer and builder, engaged in negotiations with the City Council of Greenbelt, Maryland, for zoning variances to allow him to build high density housing. Simultaneously, the City was attempting to acquire another tract of land from Bresler to construct a high school. The concurrent negotiations gave each side bargaining leverage. A newspaper accurately reported the public debate at City Council meetings where Bresler's negotiating demands were denounced as "blackmail" in the heat of argument by an opponent. Bresler sued for libel, alleging that the articles imputed a crime to him. The Supreme Court held that the "accusation" was a constitutionally protected statement, since in context, the word "blackmail" was no more than hyperbole and a vigorous epithet used in debate by those who considered Bresler's negotiating position extremely unreasonable. *Id.* at 14.

The facts in *Greenbelt* are clearly distinguishable in that in *Greenbelt* the plaintiff was being called a blackmailer in a

heated public debate, where tensions were high and angers were flaring. The Court makes a point of emphasizing that tempers become heated in public debate, and a reasonable person who read excerpts of such a heated debate could not have thought that plaintiff was actually being charged with a crime. Here in the instant action however, professional journalists took the time to write and presumably rewrite their comments and chose their words with care. Undoubtedly, the statements were approved by the editor of the Bulletin as well. Clearly, this is not a report of a heated debate, such as was presented in *Greenbelt*. This was not a situation where statements might be rashly made. Instead, Respondents here were professional wordsmiths who took the time and had the time to create their accusations purposefully and must have painstakingly created the false impression of "Blackmail" and "Extortion" with the intent that it be conveyed to their readers. The two cases are clearly inapposite.

The *Milkovich* case, decided by this Court after the *Greenbelt* case, is next in the First Amendment line and is strikingly similar to the facts presented here. This Court in *Milkovich* held that the First Amendment does not provide a separate privilege for "opinion" where statements published in a newspaper were defamatory under state law. This Court held as actionable an article appearing in a local newspaper expressing disapproval of the conduct of a coach and a superintendent at a hearing and accusing the coach of committing perjury. The Court held that the First Amendment does not prohibit the application of libel laws to the alleged defamatory statements contained in the newspaper article. The Court based its ruling, in part, on the premise that a reasonable fact finder could conclude that the statements in the newspaper article imply an assertion that the coach perjured himself at the judicial hearing. As in *Milkovich*, the statements contained in the article herein accused Petitioner of heinous criminal behavior. The accu-

sations that Petitioner is a blackmailer, dishonest and an extortionist, are not true, and Respondents know them to be untrue. There is no dispute about this.

The Court in *Milkovich* appropriately held that the article did not use the sort of loose, figurative or hyperbolic language that would negate the impression that Milkovich committed perjury, nor did the article's general tenor negate this impression. In addition the Court ruled, that the connotation that Milkovich committed perjury is sufficiently factual that it is susceptible of being proved true or false by comparing, *inter alia*, his testimony before the OHSAA Board with his subsequent testimony before the trial court. Of course, in the instant case, the accusations of "Blackmail" and "Extortion" are not true.

While the lower court held that the criminal accusations made by Respondents were explained in the body of the "Opinion," the bold print headline — "Frank 'the Extortionist' Fasi Is At It Again" — clearly states that Frank Fasi has a history of criminal behavior and has a habit of extortion. No underlying facts are given to the reader and, of course, none exist to show that Petitioner has ever been involved in any blackmail or extortion. However, the reader is obviously left with the impression that Petitioner is dishonest and has committed the crime of extortion in the past. In addition, the reference to "Blackmail incorporated" is a play on words on the infamous New York criminal mob, "Murder, Inc." This reference clearly implies that Petitioner is involved in criminal activity and is committing illegal acts based on his political power. In addition, Respondent intentionally places the word "donation" in quotes to cast a double meaning as to whether the acts alleged are truly donations or extortion.

The terms "blackmail" and "extortion" are not terms that are considered "rhetorical hyperbole" by this Court. As this Court has held in *Moldea*, "loose, figurative, or hyperbolic

statements are generally not actionable in defamation, but this status derives from the constitutional protection afforded to parody, satire, and other imaginative commentary, not from a privilege for 'opinion'." *Moldea, supra*, at 313 n.2, citing *Milkovich*. As in *Cianci*, the terms "blackmail" and "extortion" were not used merely to underscore the author's view that Petitioner's actions are harmful and inappropriate, and were not employed in a loose, figurative sense, or as "rhetorical hyperbole." The jury in *Cianci* found, the effect of the article was not simply to convey the idea that Cianci was a bad man and unworthy of the confidence of the voters, but rather to produce a specific image of depraved conduct. Such serious charges are not "undefined slogans that are part of the conventional give-and-take in our economic and political controversies." Citing *Cafeteria Union v. Angelos*, 320 U.S. 293, 295, 624 S.Ct. 126, 127 (1943).

In addition, in defining whether a term is actionable, the Court must decide whether the statement is susceptible as being proven as true or false. *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995). Unlike terms such as "fake" and "phony," "blackmail" and "extortion" are defined in the law and any statement utilizing these words can be proven true or false. The lower courts herein have clearly disregarded this Court's prior rulings in holding the libelous statements to be protected "opinion."

B. The Question Presented Is Important In The Law Of Defamation

In *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695 (1990), this Court refused to recognize a free-standing First Amendment privilege for "opinion" in addition to all other First Amendment protections that already surround defamatory speech. While this Court in *Milkovich* did not eliminate First Amendment protection for "opinion," the Court did

choose to articulate Constitutional rules in terms of the requirement that defamation actions be based upon statements of fact which are provable as false. *Id.* at 2706. Instead of establishing a constitutional distinction between "fact" and "opinion," this Court recognized a constitutional distinction between "fact" and "nonfact." The Decision emphasized that both fact and opinion are protected under the First Amendment; however, the order of analysis was reversed by putting the pressure on the preliminary question of whether the speech at issue was "factual" rather than whether it could be characterized as "opinion." In this case, the statements were not factual. Therefore, Respondents, and the Courts below, have resorted to a defense of "opinion" as a basis for allowing the statements to be protected. However, as shown in the previous decisions of this Court, the word "opinion" does not, in itself, protect otherwise actionable conduct, particularly when the allegations of a heinous crime are made without justification.

In analyzing fact/opinion, this Court has been sensitive to the context in which the words are spoken, looking to surrounding circumstances to determine how the language involved is to be construed. This Court basically set the outer "ground rules" — true opinion is absolutely protected, but misstatements of fact, particularly allegations of criminal conduct, are not. Chief Justice Rehnquist in *Milkovich* explained that fair comment provides legal immunity for the honest expression of opinion on matters of legitimate public interest when the opinion is based upon a true or privileged statement of fact. Justice Rehnquist emphasized that fair comment "was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm." *Id.* "According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied

from an expression of opinion." *Id.* "Thus under the common law, the privilege of 'fair comment' was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech." While reaffirming this Court's past decisions with regard to opinion, Chief Justice Rehnquist makes it clear that "we do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion'." Chief Justice Rehnquist was referring to a famous quote, stating that the all too familiar phrase that "there is no such thing as a false idea. . . ." Interpreting this quote, the Court maintained that it would be contrary to "the tenor and context of the passage," and would "ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich* at 2705. The Court used the following examples and discussion to illustrate its point:

> If the speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he based his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as misstatement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words "I think." *Cianci, supra*, at 64. It is worthy of note that at common law, even the privilege of fair comment did not extend to "a full statement of fact, whether it was

> expressly stated or implied from an expression of opinion." *Id.*

Rather than concentrate on whether the language at issue is opinion, *Milkovich* instructs lower Courts to concentrate on whether it is factual. In short, the Court substituted the old dichotomy between "fact and opinion" with a new dichotomy between "fact and non-fact." The key is the Court's discussion of *Hepps*:

> Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under State defamation law, at least in situations, like the present, where a media defendant is involved. Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provable false factual connotation will receive full constitutional protection.

Milkovich, at 2706 (citations to *Hepps* and *New York Times* omitted). The Court further reinforced the division between fact and non-fact by stating:

> Next, the *Bresler-Letter Carriers-Falwell* line of cases provide protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. This provides assurance that public debate will not suffer for lack of "imaginative expres-

> sion" where the "rhetorical hyperbole" which is traditionally added much to the discourse of our nation. *Id.*

The Court, in sum, made it abundantly clear that as a matter of constitutional law, defamation actions must be based on "statements provable as false." *Id.* In ruling that the column in *Milkovich* was susceptible of objective proof or disproof, the Court stated:

> We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination of whether petitioner lied in this instance can be made on a core of objective evidence by comparing, *inter alia,* petitioner's testimony before the OHSAA Board with his subsequent testimony before the Trial Court. As the *Scott* Court noted regarding the plaintiff in that case, "[w]hether or not H. Don Scott did indeed perjury himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at the hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." *Id.* at 2707.

CONCLUSION

This Court, in the line of decisions culminating with the *Milkovich* case, has defined the perimeters of the First Amendment in dealing with accusations of the commission of a crime or criminal conduct. The Respondents here have obviously attempted to push the rulings of this Court to the limits and have intentionally taken one additional step beyond. In essence, Respondents have defied the Courts in their attempt to allege both past and present criminal conduct (" 'The Extortionist' is at it again" [emphasis added], "Blackmail incorporated," "Blackmail") under the guise of "opinion." This case, therefore, poses the question, "Does the First Amendment allow false assertions of past

and present criminal conduct and acts merely by insertion of the accusations on an "Opinion" page?" This is obviously a vital and important question in the law of the First Amendment. This case squarely presents the issue for resolution and instruction relating to the limits of false criminal accusations against public officials; and, Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

DATED: August 21, 1997

Respectfully submitted,

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FRANK F. FASI

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

FRANK F. FASI,
PLAINTIFF,
VS.
GANNETT COMPANY, INC.;
LIBERTY NEWSPAPERS, LTD.;
PHILLIPS MEDIA SERVICES;
RUPERT PHILLIPS, AN
INDIVIDUAL,
DEFENDANTS.
CV. NO. 95-00585 DAE

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS COMPLAINT

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
DEC. 11, 1995
2 O'clock and 25 min. p.m.
WALTER A.Y.H. CHINN, CLERK

The court heard Defendants' Motions on December 4, 1995. Barbara Berkowitz, Esq., and David Fasi, Esq., appeared at the hearing on behalf of Plaintiff; Margaret Jenkins Leong, Esq., and Michael S. Joaquin, Esq., appeared at the hearing on behalf of Defendants Liberty Newspapers Ltd., Phillips Media Services, and Rupert Phillips (collectively, the "Liberty Newspapers Defendants"), and Jeffrey Portnoy, Esq., made a telephonic appearance at the hearing on behalf of Defendant Gannett Co. Inc. (erroneously named in Plaintiff's complaint as "Gannett Company Inc."). After reviewing the motions and the supporting and opposing memoranda, the court GRANTS Liberty Newspapers Defendants' Motion to Dismiss and GRANTS Gannett Co. Inc.'s Motion to Dismiss.

BACKGROUND

Plaintiff Frank F. Fasi ("Fasi") served as Mayor of the City and County of Honolulu, Hawaii, from 1969 to 1980 and from 1985 to 1994.[1] This action concerns an editorial about Fasi that appeared in the Honolulu Star-Bulletin on July 13, 1993, entitled "Blackmail Incorporated.[2] *See* Star-Bulletin Defendants' motion to Dismiss, Exhibit A.

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[1] Fasi reports that he resigned from his position as Mayor in July 1994, in accordance with Hawaii law to become a candidate for Governor of Hawaii in 1994. Plaintiff's Complaint, at 2.

[2] The full text of the article reads:

> **Blackmail incorporated**
>
> Frank "The Extortionist" Fasi is at it again. His current target is the Estate of James Campbell, which wants to rezone 1,781 agricultural acres so it can build a housing and commercial development at Kapolei. The mayor of Honolulu is agreeable — but only if the estate gives the city 2,500 acres of nearby land so he can build a sport complex.
>
> Unless the "donation" is forthcoming, Fasi promises to oppose the rezoning request. Last week he testified against the project before the state Land Use Commission. Why he doesn't wait until it reaches the county level is a mystery to those unfamiliar with his penchant for grandstanding.
>
> Another mystery is where Fasi gets the impression that he can sell or barter zoning. Government is the grantor of such decisions, but those determinations should be based on the need, quality and impact of projects on the community, not on what can be successfully traded or coerced from the private sector.
>
> Companies like Campbell Estate want the city to study the merits of their plans. If there are negative impacts, they need to be rectified. That's called responsible development.
>
> But legalized blackmail has unintended victims — the Hawaii resident still searching for an affordably priced home. Developers already stagger through a long, maze-like permitting process that adds millions of dollars to their projects. They are also required to put in much of the infrastructure like roads, sewers and lighting. And now land to build sports complexes?

Fasi's First Amended Complaint[3] alleges causes of action for: libel per se (count I); invasion of privacy — false light

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Those costs are simply passed on to the home buyer and are reflected in higher prices. When Frank Fasi extorts money from developers, it's the house-hunting public that is taken to the cleaners.

[3]Plaintiff's original complaint was filed on July 18, 1995, and named as Defendants Gannett Publishing, Inc., Hawaii Newspaper Agency, Honolulu Star-Bulletin, Inc., Liberty Newspapers Ltd., Phillips Media Services, Rupert Phillips, John M. Flanagan, David Shapiro, Diane Yukihiro Chang, Frank Bridgewater, and Michael Rovner. On August 28, 1995, those Defendants filed motions to dismiss Fasi's complaint. They argued that this court did not have subject matter jurisdiction pursuant to 28 U.S.C. Section 1332 because complete diversity was lacking among all Defendants.

Additionally, Honolulu Star-Bulletin, Inc., Liberty Newspapers Ltd., Phillips Media Services, Rupert Phillips, John M. Flanagan, David Shapiro, Diane Yukihiro Chang, Frank Bridgewater, and Michael Rovner ("Star-Bulletin Defendants") moved to dismiss under Fed. R. Civ. P. 12 (b) (6) on the alternate grounds that the complaint failed to state a claim because the editorial is not actionable under the First Amendment. The Star-Bulletin Defendants asserted that the statements at issue are expressions of opinion protected by the United States Constitution.

However, on October 13, 1995, Fasi filed a First Amended Complaint pursuant to Fed. R. Civ. P. 15 (a) . Rule 15 (a) allows a party the opportunity to amend its complaint as a matter of course "before a responsive pleading is served," Fed. R. Civ. P. 15 (a) , and "a motion to dismiss is not a responsive pleading within the meaning of the Rule. *Schreiber Distrib. Co. v. Serv-Well Furniture Co.,* 806 F.2d 1393, 1401 (9th Cir. 1986) (internal quotations and brackets omitted) . In his amended complaint, Fasi dropped all non-diverse dispensable parties.

At a hearing on November 6, 1995, counsel for Fasi reported that Gannett Co. Inc. (erroneously named as "Gannett Company Inc.") had not yet been served with the First Amended Complaint and as a result, was not represented at the hearing. Accordingly, the court continued the hearing to allow Fasi to serve Gannett Co. Inc. and provide it an opportunity to respond in the suit. On November 17, 1995, Gannett Co. Inc. filed a joinder in the Liberty Newspapers Defendants' Motion to Dismiss.

(count II); and intentional infliction of emotional distress (count III). Fasi prays for general, special and exemplary damages totalling no less than $70,000,000, as well as costs of suit.

Fasi argues that portions of the article are libelous because they accuse Fasi of the crimes of extortion and blackmail, focusing in particular upon the language "Frank 'The Extortionist' Fasi is at it again," and "When Frank Fasi extorts money from developers, it's the house-hunting public that is taken to the cleaners." *Id.* Fasi further claims that these statements were made in reckless disregard of the truth and with malice, and were "designed to cause injury to Plaintiff's reputation by accusing Plaintiff of illegal and immoral conduct while he held public office. . . ." Amended Complaint, at 5.

The Liberty Newspapers Defendants filed a Motion to Dismiss First Amended Complaint on November 2, 1995, and on November 17, 1995, Defendant Gannett Co. Inc. filed a joinder in the motion. All Defendants argue that the speech which is the gravamen of Plaintiff's cause of action is protected under the First Amendment of the United States Constitution.

STANDARD OF REVIEW

A motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of him claim which would entitle him to relief." *Buckey V. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992) (quoting *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989)) (further citations omitted). All allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. *Id.*

DISCUSSION

I. Fasi's Defamation Claim

Count I of Fasi's First Amended Complaint alleges a cause of action for libel per se. Under Hawaii law, the following classes of libel are libels per se:

> (1) Libels which impute to a person the commission of a crime.
>
> (2) Libels which have a tendency to injure him in his office, profession, calling or trade.
>
> (3) Libels which hold him up to scorn and ridicule and to feelings of contempt or execration, impair him in the enjoyment of society and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man.

See *Partington v. Bugliosi*, 825 F. Supp. 906, 915 (D. Haw. 1993), *aff'd*, 56 F.3d 1147 (9th Cir. 1995) (citations omitted). However, before engaging in a libel per se analysis, the court must first examine the broader question of whether the statements in "Blackmail incorporated" are actionable.

Fasi's libel claim must be considered in light of the "profound principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan* 376 U.S. 254, 270 (1964) (citations omitted). The Supreme Court has stated that this constitutional safeguard "was fashioned to assure unfettered interchange of ideas, for the bringing of political and social changes desired by the people." *Sullivan*, 376 U.S. at 269 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court recognized the need for "a federal rule that

prohibits a public official from recovering damages for defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280 (cited in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990)). In one of the next steps in the constitutional evolution, the Court concluded that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). *Philadelphia Newspapers* set forth a constitutional requirement that the plaintiff "bear the burden of showing falsity, as well as fault, before recovering damages." *Id.* at 776.

The Supreme Court has also "recognized constitutional limitations on the type of speech which may be the subject of state defamation actions." *Milkovich*, 497 U.S. at 16 (emphasis in original); *see also Letter Carriers v. Austin*, 418 U.S. 264 (1974). In *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), a newspaper was sued for republishing a speaker's comment at a city council meeting that plaintiff, a local real estate developer and politician, was "blackmailing" the city in connection with pending negotiations.[4] The Court concluded that no libel

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[4]Some of the facts of *Greenbelt* are similar to the instant case; the plaintiff in *Greenbelt* was:

> engaged in negotiations with the Greenbelt City council to obtain certain zoning variances that would allow the construction of high-density housing on land owned by him. At the same time, the city was attempting to acquire another tract of land owned by Bresler for the construction of a new high school . . . [J]oint negotiations evoked substantial local controversy. . . .

398 U.S. at 7. The plaintiff's primary contention was that the speakers in using the word "blackmail" at the city council meeting and the newspaper in reporting the use of the word in newspaper articles, were charging

had been committed because no one who read the account would have considered that the plaintiff was being charged with the crime of blackmail. *id.* at 13, 14. The Court stated that the word was "no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable." *Id.* at 14.[5]

This court recognizes that there is no "wholesale defamation exemption for anything that might be labeled 'Opinion.' " See *Milkovich v. Lorain Journal Co.*, 497 U.S. at 18. In *Milkovich*, the Supreme Court reasoned that "[s]imply

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the plaintiff with the crime of blackmail, even though they knew that he had committed no such crime. *Id.* at 13.

[5]The full text of the Supreme Court's conclusion is worth quoting here:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is devoid of evidence that anyone in the city of Greenbelt or anywhere else thought that Bresler had been charged with a crime.

Greenbelt, 398 U.S. at 14 (internal citations omitted).

Similarly, in *Letter Carriers v. Austin*, 418 U.S. 264 (1974), the Court relied on *Greenbelt* and held that "no one could reasonably understand publication of a well-known definition of a 'scab,' attributed to Jack London, as a 'traitor to his God, his country, his family and his class,' as charging the crime of treason." *Id.* at 284-86 (quoted in *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 62 (2d Cir. 1980)). The Court stated that the words were protected because defendants were using them "in a loose, figurative sense . . . merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members to those who refuse to join." *Letter Carriers*, 418 U.S. 284-86.

couching such statements in terms of opinion does not dispel [the false, defamatory] implications" because a speaker may still imply "a knowledge of facts which lead to the [defamatory] conclusion." *Id.* at 19. It therefore held that, while 'pure' opinions are protected by the First Amendment, a statement that "may . . . imply a false assertion of fact" is actionable. *Id.*[6]

The Ninth Circuit interpreted *Milkovich* in *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991). The Ninth Circuit held that, in reviewing a defamation claim, a court must ask as a threshold matter "whether a reasonable factfinder could conclude that the contested statement 'impl[ies] an assertion of objective fact.' " *See Partington v. Bugliosi*, 56 F.3d 1147, 1153 (citing *Unelko*, 912 F.2d at 1053). "If the answer is no, the claim is foreclosed by the First Amendment." *Id.* at 1153. As a starting point for the analysis, the Ninth Circuit adopted a three-part test: "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false." *Partington*, 56 F.3d at 1153. Both parties are in agreement that this is the appropriate test to apply here.

This court must examine the work as a whole, the specific context in which the statements were made, and the statements themselves to determine whether a resonable fact finder could conclude that the statements imply a false assertion of objective fact And therefore fall outside of the protection of the First Amendment. *See id.* Having done so,

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[6] "Pure" opinions are those that "do not imply facts capable of being proved true or false." *See Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991).

the court concludes that in this case the general and specific contexts in which the Defendants' contested statements were made do not imply the assertion of objective facts. The court further concludes that the challenged statements are not capable of being proved true or false. Accordingly, the court holds that, under the standards outlined in *Milkovich*, Fasi fails to state a defamation claim. The statements are protected by the First Amendment and are therefore not actionable.

A. No Objective Facts

Fasi repeatedly argues that "accusations of criminal activity, even in the form of opinion, are not constitutionally protected," citing *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 63 (2d Cir. 1980) as support. *See* Plaintiff's Opposition, at 11. The court does not dispute this proposition, but cannot reasonably conclude that the editorial article at issue accuses Fasi of criminal activity. The challenged statements must be analyzed in their broad context to determine whether they imply the assertion of an objective fact. *See Partington*, 56 F.2d at 1153 (citations omitted).

Defendants offer two arguments to support their contention that the general tenor of the editorial demonstrates that it sets forth opinion rather than fact. First, Defendants assert that the statement was made in a forum where readers anticipate subjective views. The court agrees. In *Partington*, the Ninth Circuit, in affirming this court, emphasized the importance of evaluating the "general tenor" of a work, " 'with an eye towards readers' expectations and understandings [of it].' " 56 F.3d at 1154 (citing *Moldea v. New York Times*, 22 F.3d 310, 315 (D.C. Cir.), *cert. denied*, ____ U.S. ____, 115 S. Ct. 202 (1994)). The question is whether Defendants' statements were likely to be recognized by a reader as "highly subjective opinions of the author rather

than assertions of verifiable, objective facts." *Partington*, 56 F.3d at 1154. Here, the statements Fasi challenges appeared on the editorial page of the Honolulu Star-Bulletin along with six other editorial articles. The Star-Bulletin's readers recognize that the commentary included on the editorial page contains the subjective views of authors and the publication's editorial staff, as opposed to "hard" news. *See, e.g., Milkovich*, 497 U.S. 32 ("Certain formats — editorials, reviews, political cartoons, letters to the editor — signal to the reader to anticipate a departure from what is actually known by the author as fact.") (Brennan, J., dissenting) (citations omitted); *cf. Moldea*, 22 F.3d at 315 (stressing that in critical literary reviews, a critic must be given "constitutional 'breathing space' appropriate to the genre.").

Second, Defendants argue that the underlying facts that formed the basis for the article are disclosed, and under the circumstances, the editorial is constitutionally protected. In *Partington*, the Ninth Circuit stated that, "[w]hen . . . an author writing about a controversial occurrence fairly describes the general events involved and offers his personal perspective about some of its ambiguities and disputed facts, his statements should generally be protected by the First Amendment." 56 F.3d at 1154.[7] Here, the authors of "Blackmail incorporated" disclose the facts upon which they base their conclusion that Fasi engaged in "legalized blackmail" and "extortion." Readers of the article are therefore able to understand that the authors are highly critical of Fasi, but are free to form their own opinions based on the facts presented. Thus, under the first part of the test outlined above, the court concludes that the general context in which

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[7]The Ninth Circuit agreed with this court's analysis in *Partington v. Bugliosi*, 825 F. Supp. 906, 920 (D. Haw. 1993), wherein this court stated, " [s]ince the authors make clear the point at which they run out of facts and are simply guessing, the statement, taken in context, cannot reasonably be interpreted as an assertion of fact."

the statements were made negates the impression that they imply a false statement of fact.

B. Figurative or Hyperbolic Language

For purposes of the second part of the analysis, the court finds that the *Greenbelt* analysis controls. There, the Court concluded that the use of the word "blackmailing" was no more than "rhetorical hyperbole, a vigorous epithet used by those who considered the plaintiff's negotiating position extremely unreasonable." 398 U.S. at 14. Here, Defendants, use of hyperbolic language such as "Blackmail incorporated", "Frank 'The Extortionist' Fasi," and "legalized blackmail," suggests that they were not making objective statements of fact. Such "rhetorical hyperbole" and "imaginative expression" is protected by the First Amendment. *See Partington*, 56 F.3d at 1157.

C. Not Susceptible of Being Proved True or False

The third part of the test requires the court to determine whether the statements are capable of being proved true or false. While acknowledging that this case is distinguishable from cases in which courts have examined such words or phrases as "fake," "phony," "hefty mark-up," "sloppy journalism," concluding that they were not actionable, *see Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992); *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1993); *Moldea*, 22 F.3d at 310, the court does not agree with Fasi that the article is unprotected because it unquestionably accuses Fasi of criminal conduct. The words "blackmail" and "extortion" must be read in context to determine whether the authors are actually accusing Fasi of criminal conduct; the determination cannot be made, as Fasi contends, by simply referring to the Webster's Dictionary definition of a "fact." Plaintiff's opposition, at, 18-19. Defendants correctly point out that the authors use the term

"legalized blackmail" when describing Fasi's conduct; this casts doubt on Fasi's assertion that "blackmail" and "extortion" are not capable of having numerous interpretations. Moreover, this court heeds the counsel of both Supreme Court and Ninth Circuit precedent that "where the question of truth or falsity is a close one, a court should err on the side of nonactionability." *Partington*, 56 F.3d at 1159 (citing *Moldea*, 22 F.3d at 317; *Liberty Lobby v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988)).

Federal courts play a vital role in protecting the First Amendment rights of those engaged in robust and oftentimes controversial speech that touches on matters of public concern. This task can be difficult, as James Madison recognized when he stated, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." *See Sullivan*, 376 U.S. at 271 (citing 4 Elliot's Debates on the Federal Constitution 571 (1876)). However, a firm principle upon which our democracy was founded and has flourished is that free debate is entitled to the "breathing space" that it needs to survive in order to benefit the public. *See Sullivan*, 376 U.S. at 272. While it is true that the editorial page is no longer a safe harbor for otherwise actionable libel, it is also true that the First Amendment provides broad parameters within which comment upon public issues and public officials may safely be made.

The analysis above leads this court to the conclusion that the statements made about Fasi in the Star-Bulletin editorial, though strident, tough and uncompromising, are protected under the First Amendment, and thus are not actionable. Accordingly, the court DISMISSES Fasi's, Complaint as to Count I.

II. Fasi's False Light Invasion of Privacy and Intentional Infliction of Emotional Distress Claims

Fasi's false light claim also lacks merit. The challenged statements are not actionable under the First Amendment, "regardless of the form of the tort alleged." *See Partington*, 56 F.3d at 1160. Similarly, this court rejects Fasi's claim for intentional infliction of emotional distress. Fasi's claim is foreclosed by *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). In *Hustler Magazine*, the Court held that, "public figures and public officials may not recover for the tort of emotional distress by reason of publications ... without showing in addition that the publications contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Id.* at 56. As concluded in the analysis above, the editorial at issue contains no false factual assertions, and "actual malice" cannot be established. The court therefore DISMISSES Fasi's claims for False Light Invasion of Privacy (Count II) and Intentional Infliction of Emotional Distress (Count III).

CONCLUSION

For the reasons stated above, the court GRANTS Defendants' Motion to Dismiss Plaintiff's Complaint as to all Counts.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, December 11, 1995.

DAVID ALAN EZRA
UNITED STATES
DISTRICT JUDGE

Frank F. Fasi vs. Gannett Publishing. Inc., et al., Civil No. 95-00585 DAE; ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK FASI,
Plaintiff-Appellant

v.

GANNETT COMPANY; LIBERTY NEWSPAPERS; PHILLIPS MEDIA SERVICES; and RUPERT PHILLIPS,
Defendants-Appellees

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and submitted May 6, 1997
Honolulu, Hawaii

MEMORANDUM*

No. 96-15129

D.C. No. CV-95-00585-DAE

Filed May 27, 1997

Cathy A. Catterson, Clerk
U.S. Court of Appeals

Received May 30, 1997

Before: NORRIS, HALL, and TASHIMA, Circuit Judges.

Plaintiff Frank Fasi appeals from the district court's judgment granting defendants' motion to dismiss pursuant

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

to Fed.R.Civ.Pro. 12(b)(6). We have jurisdiction, 28 U.S.C. § 1291, and we AFFIRM.

Before reaching any question of state law, this court must determine whether the speech in question is protected by the First Amendment. *See Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991). Because Fasi, as mayor of Honolulu, was a public figure at the time of the article, he has the burden to show both falsity and "actual malice." *New York Times v. Sullivan*, 376 U.S. 254, 268-70 (1964).

The First Amendment protects statements if they express an author's opinion and that opinion does not imply a false assertion of fact. *E.g., Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995). In its First Amendment analysis, this court considers the general tenor of the work, the defendants' language in the article, and whether the statements are capable of being proved true or false. *Id.* A review of the editorial at hand shows that the First Amendment protects the article.

The title, "Blackmail Incorporated," is a play on the phrase "murder incorporated." The term "extortionist" is placed in quotation marks, and the word blackmail is used in the context of "legalized blackmail." The First Amendment protects the "rhetorical hyperbole" and "imaginative expression" that authors use to enliven their prose. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). The fact that the rhetoric defendants used, in *other* contexts, could refer to factual assertions of criminal behavior is insufficient to defeat constitutional protection here. *See Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 5, 13 (1970). *Greenbelt* makes clear that the words extortion and blackmail must be viewed in the context of the article to determine their meaning.

The context of the article reveals that the phrases extortion and blackmail are rhetorical and refer to the zoning

controversy. The First Amendment protects statements when "an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions." *Partington*, 56 F.3d at 1156-57. Here, the article outlines Fasi's controversial zoning proposal, comments on the inappropriateness of Fasi's behavior, and opines that Hawaii residents will be harmed. The colorful language in question, including the words "extortion" and "blackmail," describes a public official's actions and offers a harsh criticism of those actions. Such speech falls clearly within the First Amendment's protection.

No reasonable mind, in the context of the entire editorial, could have taken the article to accuse Fasi of the literal crimes of extortion and blackmail; as such, the speech is protected. *See Underwager v. Channel 9 Australia*, 69 F.3d 361, 367 (9th Cir. 1995). The district court's dismissal of the action is AFFIRMED.

Blackmail incorporated

FRANK "The Extortionist" Fasi is at it again. His current target is the Estate of James Campbell, which wants to rezone 1,781 agricultural acres so it can build a housing and commercial development at Kapolei. The mayor of Honolulu is agreeable — but only if the estate gives the city 2,500 acres of nearby land so he can build a sports complex.

Unless the "donation" is forthcoming, Fasi promises to oppose the rezoning request. Last week he testified against the project before the state Land Use Commission. Why he doesn't wait until it reaches the county level is a mystery to those unfamiliar with his penchant for grandstanding.

Another mystery is where Fasi gets the impression that he can sell or barter zoning. Government is the grantor of such decisions, but those determinations should be based on the need, quality and impact of projects on the community, not on what can be successfully traded or coerced from the private sector.

Companies like Campbell Estate want the city to study the merits of their plans. If there are negative impacts, they need to be rectified. That's called responsible development.

But legalized blackmail has unintended victims — the Hawaii resident still searching for an affordably priced home. Developers already stagger through a long, mazelike permitting process that adds millions of dollars to their projects. They are also required to put in much of the infrastructure like roads, sewers and lighting. And now land to build sports complexes?

Those costs are simply passed on to the home buyer and are reflected in higher prices. When Frank Fasi extorts money from developers, it's the house-hunting public that is taken to the cleaners.